IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

TUESDAY, THE SEVENTEENTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE SRI DEVINDER GUPTA,THE CHIEF JUSTICE

and
THE HON'BLE MR JUSTICE C.V.RAMULU

WRIT APPEAL NO : 1170 of 2004

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 23/07/2004 in WP NO : 8180 OF 2004 on the file of the High Court.)

Between:

Gail (India) Ltd. A Govt.of India undertaking,

Hyderabad Zonal Office,

6-3-871, 3rd Floor, Snehalatha Complex, Greenlands Road, Begumpet, Hyderabad represented by its Zonal Dy.General Manager, Hyderabad

..... APPELLANT

AND

Nagarjuna Cerachem Pvt.Ltd

Plot No.6/1, I.D.A.Nacharam, Hyderabad
represented by its Director Shri K.Ravi, S/o Ramachandra Raju, aged about 49 years,
at 150 NCL Enclave, Pet Basheerabad, Medchal Road, Jeedimetla, Ranga Reddy District

.....RESPONDENT

Counsel for the Appellant: Mr Kakara Venkata Rao

Counsel for the Respondent: Mr K.Gopala Choudhury

The Court made the following JUDGMENT:

(per Hon'ble Sri Devinder Gupta, the Chief Justice)

This appeal is by the respondent, which is Government of India Undertaking, against the order passed by the learned single Judge on 23.7.2004 in W.P.M.P.No. 10632 of 2004 in Writ Petition No. 8180 of 2004. By the said impugned order, learned single Judge allowed the application filed by the respondent/writ petitioner holding that the action of the appellant requiring the writ petitioner to agree to the amendment of contract is neither fair nor reasonable and thus the appellant was acting arbitrarily in asking the writ petitioner to take 10,000 SCMD per day. The agreement between the parties does not provide for taking of minimum supply of gas to be utilized by the writ petitioner and, therefore, the appellant cannot insist the writ petitioner to take the entire quantity of the allocation made by the Central Government. Thus holding the writ petition to be maintainable, learned single Judge proceeded to issue interim direction as prayed for in the miscellaneous application thereby directing the appellant to forthwith commence and continue to supply the gas to the respondent/writ petitioner.

2. We have heard learned counsel for the parties at the admission stage itself. The facts in brief are that on 24.12.2002 Government of India approved allocation of 10,000 SCMD gas on fallback basis to the writ petitioner subject to the condition of writ petitioner entering into the contract with the appellant. On 3.1.2003 the appellant requested the writ petitioner to confirm its willingness to receive the allocated quantity of gas. Ultimately, on 30.4.2003 the writ petitioner signed gas supply contract with the appellant accepting for commencement of drawal of gas from 31.3.2004 with a condition that if the drawal of gas is not started by the said date, the appellant will have unrestricted right to terminate the contract and forfeit the security deposit.

3. It is the case of the appellant that on 27.10.2003 while the writ petitioner expressed its willingness to utilize only 2000 SCMD gas by 31.3.2004 requested the appellant to permit it to assign/sell the remaining 8000 SCMD out of the total allocation to NCL Industries Limited. On 17.1.2004, the appellant asked the writ petitioner to sign amendment to the contract by incorporating minimum guarantee off take clause (in short MGO) since the appellant had come under obligation to pay minimum guarantee take off charges to ONGC in view of the delay being caused in drawing of the gas by the consumers. On 28.1.2004 the writ petitioner refused to

agree for the amendment proposed by the appellant. On 6.2.2004 the appellant informed the writ petitioner that the appellant has to pay MGO charges to ONGC and as such amendment to incorporate MGO clause need to be signed by the writ petitioner as by that date it was clear that the writ petitioner was not in a position to draw the allocated gas by the agreed date i.e., 31.3.2004. On 25.2.2004 the appellant is alleged to have informed the writ petitioner that it would be difficult to consider writ petitioner's request for transfer of 8000 SCMD in the absence of amendment to the contract incorporating MGO clause. On 8.3.2004 the writ petitioner conveyed its unwillingness to the amendment as proposed by the appellant asserting that the terms and conditions of contract as existed will continue. It is alleged by the appellant that on 27.3.2004 the writ petitioner was informed that all facilities to supply gas were ready and requested the writ petitioner to start drawal of gas from 31.3.2004 as per the contract. On 1.4.2004 writ petitioner requested the appellant to extend the gas drawal date up to 30.4.2004 so as to enable it to utilize 2000 SCMD out of total allocation of 10000 SCMD. On 2.4.2004 the writ petitioner was asked to furnish gas drawal pattern for the entire 10,000 SCMD gas since the contract date of drawal of gas had already elapsed.

4. It is the case of the appellant that the writ petitioner did not indicate gas drawal date for 8000 SCMD and on 20.4.2004 the appellant is alleged to have informed the writ petitioner of its willingness for amendment of contract as asked for by the writ petitioner for extension of the date of drawal provided the writ petitioner was agreeable for the corresponding amendment as proposed by the appellant by incorporating MGO clause. The writ petitioner was also informed that the appellant will be constrained to take action for termination of contract as the writ petitioner had failed to start withdrawal of gas from 31.3.2004.

5. On the basis of the aforementioned allegations and the factual backdrop on 27.4.2004 the writ petition was filed seeking mandamus to declare the action of the appellant in requiring and coercing it to sign amendment to the contract thereby providing for minimum guarantee off take clause since the writ petitioner was not agreeable for the same and consequently to declare the action of the appellant in withholding supply of gas and threatening cancellation of gas allocation and termination of contract and forfeiture of security deposit as illegal. Along with the writ petition W.P.M.P.No. 10632 of 2004 was also filed praying that pending disposal of the writ petition appellant be directed to commence and continue to supply gas for drawal in terms of conditions contained in contract dated 30.4.2003 with a further

direction to the appellant not to take any action as proposed by it.

6. Writ petition was opposed on a short affidavit filed by the appellant saying that the appellant has acted in accordance and in conformity with the terms of agreement and there is no arbitrariness in its action and reserved its right to file a detailed and comprehensive affidavit. The appellant raised a preliminary objection about maintainability of writ petition that it was a case in which the writ petitioner was not willing to fulfill its obligation under the order of the Central Government and under the gas supply agreement entered into by it with the appellant. Writ petitioner wants to deviate from the terms of agreement. Writ petitioner had nowhere expressed its willingness to draw the contractual quantity of gas and wanted to transfer/sell a major portion of the same to its alleged sister concern for which it had no right to insist upon. It was the discretion of the Central Government to permit or not to permit transfer. Under the terms of contract, the writ petitioner could not have postponed drawal of gas agreed from 31.3.2004. Since the writ petitioner was willing to draw only 2000 SCMD gas and had sought extension beyond time and was not ready and willing to perform its part of contract, in such a contractual matter no writ petition would lie.

7. Learned single Judge, by the impugned order, on the basis of the material on record observed that there was no minimum guarantee off take obligation specified in any of the clauses of the contract. Therefore, the action of the appellant in coercing the writ petitioner to agree to the amendment is not fair and it is unreasonable. It was held that unless mutual consent is given, amendment to agreement cannot be effected and thus the appellant's action was arbitrary. Learned single Judge held that the writ petition was maintainable even if right to relief in the writ petition arose out of the alleged breach of contract. He held that the action under challenge was that of a public authority invested with statutory powers and on a given set of facts if a State or instrumentality of the State acts in an arbitrary manner, even in the matter of contract, the aggrieved party can approach the Court by way of writ petition. Reliance was placed on the decision of the Supreme Court in **K.N. Guruswamy v. State of Mysore** and **Kumari Shrilekha Vidyarthi v. State of U.P.** Learned single Judge was not impressed with the submission made on behalf of the appellant and the two decisions relied upon viz., **National Highways Authority of India v. Ganga Enterprises** and **State of J & K v. Ghulam Mohd. Dar**.

8 . The Supreme Court in **ABL International Ltd. v. Export Credit Guarantee**

Corpn. of India Ltd., considered the question about maintainability of writ petition under Article 226 of the Constitution of India for enforcement of contractual obligation against the State or its instrumentality by an aggrieved party and held that such a question was no more *res integra* and has been settled by a large number of judicial pronouncements by it. The first decision on the point referred to is **K.L. Guruswamy (supra)** wherein the Supreme Court held that on a given set of facts, if the State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ petition under Article 226 of the Constitution. The Court depending on facts of the said case is empowered to grant the relief. Subsequent decision in **D.F.O., v. Ram Sanehi Singh** was referred wherein it was held that writ petition would be maintainable even if right to relief arose out of alleged breach of contract, where the action challenged was of a public authority invested with statutory powers. Another decision, viz., **State of U.P., v. Bridge & Roof Co. (India) Ltd.,** in which similar view was taken, was referred to with approval. In **Bridge & Roof Co.,** the Supreme Court specifically held:

> "The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 — whether for issuance of mandamus or any other writ, order or direction — was misconceived for the reasons mentioned supra."
>
> (Emphasis supplied)

9. In **ABL International Ltd., (supra)**, the Supreme Court while referring to the decision in **Bridge & Roof Co. (supra)** wherein because of an arbitration clause in the contract, the High Court had refused to invoke its jurisdiction under Article 226 of the Constitution, the Bench observed:

> "We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by

> arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution. Since that is not the case in the instant appeal, the observations of this Court in the said case of *Bridge & Roof Co.,* are of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable."

(Emphasis supplied)

10. While referring to the facts of the instant case, we have not referred to the clauses of the agreement. Article 12 of the agreement is the arbitration clause, which inter alia provides that any dispute or differences whatsoever arising out of contract, which is not settled by mutual consultations shall be referred for arbitration and the decision of the arbitrator shall be final and binding on both the parties. The arbitration clause makes the provision of the Arbitration and Conciliation Act, 1996 applicable.

11. Learned single Judge did not examine the question from the angle that in case where parties to dispute had agreed to settle the disputes by arbitration, would a party be permitted to seek redressal by invoking extraordinary jurisdiction under Article 226 of the Constitution of India for enforcement of its rights and obligations under the contract. Due to the learned single Judge not adverting to the core question, the impugned order is liable to be interfered with.

12. Admittedly, there is an arbitration clause in the agreement under which all disputes and differences, if not settled mutually, will have to be referred for arbitration. The disputes and differences will have to be decided by the arbitrator only who can grant adequate relief. May be that the appellant is an instrumentality of the State, but it is not discharging any public function. Supply of gas is not a public function. It has entered into a commercial contract with the respondent/writ petitioner. There is a dispute amongst the parties as to whether there is any breach of obligation on the part of the appellant or the writ petitioner/respondent. In such like matters, on the ratio of the decision of the Supreme Court in **Bridge & Roof. Co., (India) Ltd., (supra)**, as approved in **ABL International Ltd., (supra)** it is not at all permissible to entertain a petition filed under Article 226 of the Constitution of India or invoke the extraordinary jurisdiction because of the existence of an effective remedy, which is provided in the contract itself. Availability of an alternative remedy

is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution, which aspect the learned single Judge has failed to notice and has gone to the extent of holding that the action of the appellant is arbitrary. Such a decision, even if has to be taken, *prima facie,* ought not to have been taken by the Court, but it is for the arbitrator to take such a decision on facts.

13. Consequently the appeal is allowed and the impugned order is set aside. Writ petition filed by the writ petitioner is held to be not maintainable, which itself is dismissed, including W.P.M.P.No. 10632 of 2004 in which impugned order was passed.

August, 2004.

Sarfraz

To

1. One fair copy to the Hon'ble Sri Justice Devinder Gupta, the Chief Justice
(for his Lordship's kind perusal)

2. One fair copy to the Hon'ble Sri Justice C.V.Ramulu

(for his Lordship's kind perusal)

3. The Deputy General Manager,

Gail (India) Ltd. A Govt.of India undertaking,

Hyderabad Zonal Office,

6-3-871, 3rd Floor, Snehalatha Complex, Greenlands Road, Begumpet, Hyderabad

4. 8 L.R. copies.

5. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

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7. 2 CD copies.

***THE HON'BLE SRI DEVINDER GUPTA,THE CHIEF JUSTICE**

and

***THE HON'BLE MR JUSTICE C.V.RAMULU**

+WRIT APPEAL NO : 1170 of 2004

% 17th August, 2004.

$ Gail (India) Limited

and

 # Nagarjuna Cerachem Pvt Ltd

! Counsel for the appellant: Mr Kakara Venkata Rao

^ Counsel for the respondent: Mr K.Gopala Choudhary

< Gist:

> Head Note:

? Cases referred:

AIR 1954 SC 592.

(1991) 1 SCC 212.

(2003) 7 SCC 410.

2003 (1) DT (SC) (NRC) 159.

(2004) 3 SCC 553.

(1973) 3 SCC 864.

(1996) 6 SCC 22.